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OCT 24 1905
JAMES H. McKENNEY,
Clerk.

No. 118.

In the Supreme Court of the United States

OCTOBER TERM, 1905.

SOFRE L. ALEXANDER, APPELLANT,

vs.

SEFERINO CROLLOTT, JUSTICE OF THE PEACE OF PRECINCT No. 18 OF THE COUNTY OF BERNALILLO AND TERRITORY OF NEW MEXICO.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

WM. B. CHILDERS,
Attorney for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

NO. 118.

Sofre L. Alexander, Appellant,

vs.

Seferino Crollott, Justice of the Peace of Precinct No. 13 of the County of Bernalillo and Territory of New Mexico.

Motion to Dismiss Appeal or Affirm the Judgment of the Court Below.

Now comes the appellee in the above entitled cause and moves the court to dismiss the appeal taken from the Supreme Court of New Mexico, and said cause, or affirm the judgment of the Court below for the reasons following, towit:

First: Because the appellant had a full and complete legal remedy by appeal from the decision of the said Justice of the Peace and appellee, to the District Court of the Second Judicial District of the Territory of New Mexico, for the County of Bernalillo, to correct any erroneous decision and Judgment of the said Justice of the Peace, if such there was.

Second: Because no appeal lies from the judgment of

the Supreme Court of New Mexico quashing the writ of prohibition directed to appellee, commanding him to desist and refrain from any other proceedings in the forcible entry and detainer cases mentioned in the said writ.

Third: Because no appeal lies from the order of the Supreme Court of New Mexico, quashing the writ of prohibition, from which said order the appeal is taken in this cause.

WM. B. CHILDERS,
Attorney for Appellee.

BRIEF IN SUPPORT OF MOTION.

The writ of prohibition in this cause was issued out of the Territorial Supreme Court on the order of one of the Associate Justices of said Court, commanding the appellee, a Justice of the Peace, to desist and refrain from other proceedings in five separate actions of forcible entry and detainer. (Record, page 20-21.)

The ground for the application for the writ of prohibition was that upon the hearing of said several causes before the Justice of the Peace, motions were made that the said Justice desist and refrain from the determination of said suits because of the want of jurisdiction in said Justice of the Peace to try and determine the question of title raised by the answers filed in said suits. These motions were overruled by the Justice of the Peace and after trial judgments were entered in favor of the plaintiff in said suits and against the defendants. (Record, page 4.)

The writ of prohibition was quashed by the Supreme Court of the Territory, upon the grounds set out in appellee's motion in said Court. (Record, folios 31, 32 and 34.) The ground principally insisted upon for quashing said writ, and still insisted upon, was that the appellant had a full and complete remedy, even if the decision of the Justice was erroneous, by appeal to the District Court.

Appellee insists that this appeal should be dismissed, because the order quashing the writ of prohibition was an order quashing final process and no appeal lies therefrom.

The judgment of the Justice of the Peace had already been rendered. The only question sought to be accomplished by the writ of prohibition was to prevent the execution of final process on the judgment. If the judgment was a nullity it could have been corrected by appeal and also by a bill in equity to enjoin its execution, and prohibition wasn't necessary.

See, *Amis vs Smith, 16 Peters 303.*

The decision of the court below upon a rule or motion to quash an execution is not a final judgement from which an appeal or writ of error will lie under the Judiciary Act of 1789.

McCargo vs Chapman, 20 Howard 555.

In *Gregg vs Forsythe, 2 Wallace 56*, a refusal to award a writ of restitution in ejectment was held to be not appealable.

To the same effect is

Smith vs Trabue's Heirs, 9 Peters 4,

where a writ of restitution was awarded in a similar case, the defendant having been improperly dispossessed of his land. The court said:

"This is not a final judgment in a civil action, nor a decree in a court of equity. It is no more than the action of a court on its own process, which is submitted to its own discretion. This court takes no jurisdiction in such a case. It is not, we think, given by the Judicial Act."

Smith vs Trabue's Heirs, 9 Peters 4.

In *Harrington vs Holler, 111 United States 796*, the court decided that the dismissal of a writ of error was a refusal to hear and decide the case, and that from such a determination of the court an appeal or writ of error would not lie; that the remedy is by mandamus to compel the court to entertain the case and proceed to its determination. This is exactly what the Supreme Court of New Mexico did. It quashed the writ and refused to hear it for the reason that the remedy was by appeal from the Justice of the Peace. The appeal then is not a proper remedy and it should be dismissed.

To the same effect, see

Hentig vs Page, 102 United States 219.

The court treats an appeal upon the refusal of a court to recall its execution as in the nature of a suggestion that the writ had been improvidently issued, therefore it should be withdrawn. The court held that:

"She (appellant) has still all the legal and equitable remedies to enforce her original rights that she ever had. If the writ would not justify the marshal in putting her tenants out of possession when it was issued, it will not now. If she could by a suit in equity enjoin the execution of the writ against her tenants before the motion was made, she could afterwards."

Hentig vs. Page, 102 United States 221.

This is fully applicable to this case.

See, also

Boyle vs Zacharie, 6 Peters 648;

to the effect that the refusal to quash an execution is not in the sense of the common law a judgment, much less a final judgment. It is a mere interlocutory order.

To the same effect,

Evans vs. Gee, 14 Peters 1.

See, also,

The Elmira, 16 Fed. Rep. 133.

where many of the authorities on this subject are cited and discussed.

On such a motion the court will either dismiss the appeal or writ of error or affirm the judgment of the court below, under Rule VI of this court.

Micas vs. Williams, 104 United States 556.

And especially when it is evidentt that the case is brought to this court for the purpose of delay.

Evans vs. Brown, 109 U. S. 180.

Respectfully submitted,

WM. B. CHILDERS,

Attorney for Appellee.